OGC 60-0512

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: Protection of Classified Intelligence Information

1. This memorandum is for information only.

2. On 31 March 1960 you spoke to me about consideration of the Official Secrets Acts in regard to protection of classified information. Accordingly, I will review what we have been doing in this field and proposals we have for future action. We have been studying the problem of protection of classified information, particularly relating to intelligence sources and methods, for many years with a view to developing statutory provisions which would provide a real tool for enforcement and yet not be in violation of the constitution. We have made several studies of the British Official Secrets Acts, and in the fall of 1958 I discussed the practical applications of the Acts at some length with [redacted] I cannot find that Justice or any other U. S. Government agency has studied the English system in any detail and I do not consider our work by any means exhaustive but certain points become clear.

25X1

3. It is not commonly understood that the British acts are based on a different theory from that of our espionage acts. Under our system the information involved must be shown to be related to the national defense and security either by specific demonstration or as coming within the definitions of a statute as in the case of the COMINT and Atomic Energy provisions. The British acts are based on the theory of privilege, i.e., that all official information is the property of the crown. It is, therefore, privileged as to those who received it officially so that they may not divulge it without the crown's authority. Since this privilege is theoretically unlimited in scope, action in the event of an unauthorized

OGC Has Reviewed

[redacted]

disclosure involves two problems for the Attorney General. The first is considered a political one as to whether the nature of the disclosure is such that prosecution should be sought; the second is a legal one as to whether prosecution is feasible. If prosecution is decided upon, several consequences flow from the basic theory of privilege. Portions of the trial can be held in camera if the court agrees. This would not be possible under our constitution. Certain presumptions may apply. As for instance, if the defendant is known to have possession of privileged information and to have been in the company of a known foreign espionage agent, there is a presumption that the information was passed. This is rebuttable but our Supreme Court opinions indicate that such a presumption would not be permissible here. Most important, in the English system it is not necessary to prove that any one item of information relates to the national defense and security. A good example is the so-called ISIS case in which two Oxford students published in their college magazine, ISIS, the story of their experiences in the Navy, including ELINT operations in the Baltic. The prosecution merely testified that the article contained information which they had acquired in their official service and it was, therefore, privileged. After the verdict of guilty, the prosecution approached the court alone without presence of defendants or defense counsel and briefed the court on the significance to the Government of the items of information, particularly those relating to ELINT. This was solely for the purpose of informing the court in connection with the sentence. Again we believe such a briefing would be held error under our system. In the current case of the RAF officer, Wraight, who defected to Russia and then returned, a Government witness who interviewed him for the security services was allowed to testify without publicly identifying himself. His name was handed in writing to the court. Possibly this could be done here if the defense agreed to it, but it seems clear it could not be done over the defense's objection.

4. The closest we have come yet to the British system is the COMINT section of the espionage acts, 18 USC 798, and section 227 of the Atomic Energy Act regarding the communication of Restricted Data. These do not require proof of intent to injure the United States or aid a foreign power but provide the punishment for the mere disclosure of information coming within a defined category. The National Aeronautics and Space Administration obtained a provision in section 304 of its act that whoever willfully violates any regulation or order of the Administrator for the protection or security of its facilities or equipment shall be

fined not more than $5,000 or imprisoned not more than one year or both. These sections have not been thoroughly tested, and in the Petersen case, which was prosecuted under the COMINT section, we feel that if it had been vigorously defended instead of a guilty plea being entered a conviction might not have been obtained due to security limitations on the evidence required.

5. On our belief and that of the Department of Justice that the Official Secrets Acts concept would be ruled unconstitutional, we have been seeking other means of improving the protection of intelligence information. The first and most obvious is to give extraterritorial effect to the existing espionage laws, which are now limited to the United States, its territories and possessions. Justice has introduced a bill for this purpose, about which we have some doubts which we have expressed to Justice. It passed the House last year but it does not appear to be moving forward in this session. Secondly, we believe it possible to define a category of information relating to intelligence sources and methods which could then be incorporated into a criminal statute similar to the COMINT and Restricted Data statutes. Thirdly, we propose a provision similar to that in the Atomic Energy Act which provides for injunctive action against any person who is about to engage in a violation of any provision of existing statutes or regulations or orders issued thereunder. The Atomic Energy injunction provision has not been tested in the courts, but apparently it has been effectively used to stop publications which the Atomic Energy Commission felt contained Restricted Data.

6. As a fourth approach we have been studying various sections for the control of information generally, and particularly the one which makes it a crime for an employee who by virtue of his office gains information which might affect the market value of commodities such as grain, which information by law or by the rules of his department or agency is required to be withheld from publication, if he willfully reveals that information to any person not entitled to it under such rules or regulations. We have drafted a proposed section which would provide that whoever being an employee becomes possessed of intelligence which is by law, executive order, or the rules or regulations of the department or agency concerned required to be withheld from release or publication, directly or indirectly makes this intelligence known to any person not entitled under the law or rules or regulations to receive the same, be fined or imprisoned or both. It would probably be necessary to provide that such an individual would

not be deemed guilty of a violation of such rules unless it can be shown that he had an actual knowledge thereof. Our thought is that if such a statute were enacted prosecution would be possible without the necessity to prove intent to harm the United States or aid a foreign power or to prove that the information related to the national defense and security. This is a somewhat new area and poses many difficulties, but if there were such a statute it would at least help to protect those especially sensitive projects and areas where recipients of information are specifically briefed and acknowledge in writing the fact that they are aware of the sensitivity of the information.

7. We have discussed each of these proposals with Justice and have been informed that it does not propose to take any action except on the extraterritoriality aspect, which as noted above has already been introduced. We are informally told, however, that Justice has no objection to our seeking to obtain such legislation on our own. It should be noted that the Atomic Energy Commission and the National Aeronautics and Space Administration get their special provisions through their own committees as part of package legislation dealing with many other aspects. They did not, therefore, come within the jurisdiction of the Judiciary Committees and little attention was given them at the time of their passage. If we had other legislation under consideration we might try a similar approach, particularly as we have had an expression of interest from at least one of the members of our Subcommittee of the Armed Services Committee in the House. Alternatively, the Security Committee of USIB may suggest that we present our views regarding possible legislation to them for study in the various agencies represented. If they agree we should proceed they would so recommend to USIB, and if our views were supported there you could take the problem forward on behalf of the intelligence community. Policy aspects of seeking such legislation will, of course, be of concern to the White House.

s/ Lawrence R. Houston

LAWRENCE R. HOUSTON
General Counsel

Distribution
DCI
DDCI
ER
IG
DD/I
DD/S
Director of Security
Chief, CI
General Counsel